



January 2, 2002

Mr. T. Daniel Santee, II
Assistant City Attorney
City of Abilene
P.O. Box 60
Abilene, Texas 79604

OR2002-0021

Dear Mr. Santee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156769.

The City of Abilene (the "city") received two separate requests from the same requestor for bid information pertaining to three named companies which submitted bids in response to the city's request for proposals for wireless service.¹ We have combined these requests into one ruling with the identification number listed above.² You claim that the requested information is excepted from disclosure under sections 552.101 and 552.110 of the Government Code. In addition, pursuant to section 552.305, you indicate that you notified the parties with a proprietary interest in the information of the request.³ We received no arguments from any third parties. Therefore, we will consider the exceptions you raised.

¹The first request, received by the city on October 8, 2001, sought information pertaining to Sprint and Nextel. The second request, received by the city on October 24, 2001, sought information pertaining to Sprint, Nextel, and Cingular.

²The other request was assigned file identification number 157145.

³See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). In this regard, we note that you state in both of the city's letters to this office, that "[a]ttached as Exhibit C is the required notice statement to persons whose proprietary information is requested. Any further documentation or briefing will be supplied in accordance with that procedure." The contents of both attachments labeled "C" consist of letters from the city to Nextel Partners, Inc. and to Cingular Wireless. In addition, we note you submitted as Exhibit B what you state "are all of the potential documents responsive to the request." Exhibit B contains only the information submitted to the city by Nextel and by Cingular. Therefore, as you did not submit any information pertaining to a bid submitted by Sprint, this ruling does not address whether any such information pertaining to Sprint is excepted from disclosure under chapter 552 of the Government Code.

Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information protected by other statutes, and also encompasses the doctrines of common-law and constitutional privacy. Upon review of the submitted information, we are unaware of any law that would make this information confidential, nor do you argue that any specific law is applicable, other than section 552.110. Therefore, we find that the submitted information is not excepted under section 552.101.

We next address the applicability of section 552.110 to the requested information. Section 552.110 protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b). The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).⁴ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). The commercial or financial branch of section 552.110 requires the business enterprise whose information is at issue to make a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. *See* Open Records Decision No. 661 (1999).

Upon review of the arguments you submitted to this office, we conclude that you have not demonstrated how any of the submitted information is excepted from disclosure as either a trade secret under section 552.110(a) or as commercial or financial information under section 552.110(b). Therefore, the submitted information may not be withheld under section 552.110.

⁴The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

Finally, we note your assertion that “[t]he proposals indicated that their contents were proprietary and confidential. Upon contacting the individual vendors, they concurred that the information contained within their proposals was proprietary and confidential and requested that we not disclose the information.” We note, however, that information is not made confidential under the Public Information Act simply because the party submitting the information anticipates or requests that it be kept confidential. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied* 430 U.S. 931 (1977); see also Open Records Decision Nos. 479 (1987) (information is not confidential under Public Information Act simply because party submitting it anticipates or requests that it be kept confidential), 203 (1978) (mere expectation of confidentiality by individual supplying information does not properly invoke section 552.110). Therefore, we find that the submitted information is not excepted from disclosure and must be released to the requestor in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/seg

Ref: ID# 156769

Enc. Submitted documents

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